Supreme Court, U.S.
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(2)

No. 97-2026

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF ARIZONA,

Petitioner,

-vs-

WILLIAM LEE BRANHAM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED

Is it unreasonable for police to conduct a warrantless search of the interior of a vehicle for the vehicle registration after a citizen is stopped for driving 45 mph in a 35 mph zone, and the citizen produces a valid drivers license and informs the officer he has left his registration at home, and there is no other indication that the citizen or vehicle is or has been involved in criminal activity?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii-iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	
I. This Court Should Not Take Jurisdiction of This Case Because the Proceedings Have Been Completed in State Court and the Case Has Been Dismissed With Prejudice	4
II. Contrary to the Claim of the Petitioner, the Decision of the Arizona Appellate Court is Not in Conflict With a Majority of Other State and Federal Jurisdictions	6
III. It is Unreasonable to Permit a Search of a Considerable Portion of the Interior of a Vehicle in the Absence of a Reasonable Belief that the Car is Stolen or Otherwise Involved in Criminal Activity	16
CONCLUSION	19
APPENDIX A	A-1

TABLE OF AUTHORITIES

Cases **Page**

California v. Stewart,
384 U.S. 436 (1966)..... 5

Camara v. Municipal Court,
387 U.S. 523 (1967)..... 16

Delaware v. Prouse,
440 U.S. 648 (1979)..... 16

Jackson v. Superior Court,
142 Cal. Rptr. 299 (Cal. 1977)..... 8

North Dakota Pharmacy Board v. Snyder's Stores,
414 U.S. 156 (1973)..... 4-5

New York v. Class,
475 U.S. 106 (1986).....4, 8, 16, 18

New York v. Quarles,
467 U.S. 649 (1981)..... 4

People v. Reyes,
499 N.Y.S.2d 321 (N.Y. Sup. Ct. 1986)..... 9

People v. Superior Court,
496 P.2d 1205 (Cal. 1972)..... 17

South Dakota v. Opperman,
428 U.S. 364 (1976)..... 10

State v. Barrett,
406 A.2d 198 (N.J. Super. 1979)..... 14

State v. Boykins,
232 A.2d 141 (N.J. 1967)..... 11, 12

State v. Byrd,
209 S.E.2d 516 (App. N.C. 1974)..... 15

State v. Halstead,
414 A.2d 1138 (R.I. 1980)..... 10

State v. Patino,
414 A.2d 1327 (N.J. 1980)..... 13

Terry v. Ohio,
392 U.S. 1 (1968)..... 18

United States v. Miller,
84 F.3d 1244 (10th Cir. 1996)..... 7

Constitutional Provisions

U.S. Const. Amend IV.....4, 10, 16, 18, 19

Rules

Rule 16.6(d), Arizona Rules of Criminal Procedure..... 5

Other Authorities

La Fave, *Search and Seizure,* § 7.4(d), (3d ed. 1996).... 17

OPINION BELOW

Respondent concurs with the Statement of the Opinion Below as set forth in the Petitioner's petition.

JURISDICTION

Respondent concurs with the statement of Jurisdiction insofar as it sets forth the proper time limitations, constitutional provisions, statutory provisions, and rules. Respondent disagrees, however, that this Court has Jurisdiction to review the decision of the Arizona Court in that although the petition was timely filed, it was filed after this case was concluded and dismissed with prejudice in the Arizona Courts. (*See,* Argument Section I, pages 4-5.).

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent concurs with the Statement of Constitutional Provisions Involved as set forth in the Petitioner's petition.

STATEMENT OF THE CASE

A police officer, Johnson, observed a vehicle traveling 45 miles per hour in a 35 mile per hour zone. Johnson activated his emergency lights and the vehicle, driven by Respondent Branham, immediately pulled to the side of the road.

Johnson contacted Branham, who identified himself by producing a valid Arizona drivers license. Branham was unable to produce his registration because, as he told Johnson, he had recently cleaned out his car and left the registration on the counter at home. Nonetheless, Johnson twice ordered Branham to search for the registration.

Despite the fact that Johnson could have confirmed ownership of the vehicle, as he testified, by using his radio to check with the Department of Motor Vehicles, Johnson decided to conduct his own search of the vehicle for the registration. Johnson testified that his decision to search was based on nothing more than a whim and for his own training and to keep updated. Johnson then told Branham he would enter the vehicle to conduct a search. Johnson never asked for permission to search.

Johnson began his search at the console area of the car. Johnson claimed he noticed large hole in the top part of a piece

of plastic around the gearbox and that papers were jammed in the hole. He said he could see past these papers into the hole where he claims he saw scales and a vial. Inside the vial was a substance later identified as Methamphetamine.

Branham had only owned the vehicle for six months prior to the day he was stopped. He purchased the vehicle out of the newspaper from an individual he did not know personally. He denied there was a hole in the gearbox when he was stopped by Johnson.

REASONS FOR DENYING THE WRIT

I. This Court Should Not Take Jurisdiction of This Case Because the Proceedings Have Been Completed in State Court and the Case Has Been Dismissed With Prejudice.

This is a case where a Fourth Amendment federal question was resolved in the state appellate courts, but the case was remanded for further proceedings in the state superior court. The appellate court found that the search of Branham's vehicle was unconstitutional. The question on remand was whether Branham had consented to the search of his vehicle. This question was answered in the negative by the trial judge. (*See,* Appendix A, Minute Order ruling that Branham did not consent to the search). At the conclusion of the evidentiary hearing, following remand, the judge dismissed this case *with prejudice*, with no objection to the dismissal by the state. (*Id.*).

Branham recognizes that this Court has accepted review of cases where there was a remand for further proceedings on other issues following an appellate ruling on a federal question. Branham submits, however, that this Court accepted review of those cases ***prior to completion*** of the proceedings in state courts. *See, e.g., New York v. Quarles,* 467 U.S. 649, 651 n.1 (1984); *North Dakota Pharmacy Board v. Snyder's Stores,* 414

U.S. 156, 159-64, (1973); *California v. Stewart,* 384 U.S. 436, 498 n.71 (1966).

Here, the proceedings in State Court concluded *before* the petition for certiorari was filed. Moreover, the proceedings for the instant case were dismissed *with prejudice* by the state court without objection by the state *before* the petition for certiorari was filed.[1] A dismissal with prejudice bars further prosecution of an accused. *Rule 16.6(d), Arizona Rules of Criminal Procedure.*

Branham submits that he can no longer be prosecuted due to the dismissal with prejudice and that this Court should not entertain jurisdiction of a case where proceedings have reached a final, irrevocable, conclusion in state court.

This Court should also take into consideration the disruption to Respondent Branham's life and the anxiety that has resulted from the state pursuing this matter after a dismissal with prejudice has been entered by the Superior Court of Arizona. A dismissal with prejudice should be just that -- a *final* conclusion of the proceedings.

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1 The dismissal with prejudice was entered on May 28, 1998. It was not appealed. The Petition for Certiorari was not filed until mid-June, 1998.

II. Contrary to the Claim of the Petitioner, the Decision of the Arizona Appellate Court is Not in Conflict With a Majority of Other State and Federal Jurisdictions.

The Petitioner attempts to make the petition for certiorari cert-worthy by claiming there is a vast conflict between state and federal courts regarding the issue presented. A review of the decisions relied upon by the petitioner belies this assertion. Six of the cases relied upon by the State of Arizona offer no support whatsoever. Only one case supports the petitioner.

A. *New York v. Class*.

One of the reasons many of the cases relied upon by petitioner offer no support is because the petitioner reads the *Branham* decision too broadly. The petitioner would have this Court believe that *Branham* conflicts with this Court's decision in *New York v. Class*, 475 U.S. 106 (1986). Such is not the case.

Class dealt with an officer reaching into a vehicle to move papers on the dashboard which covered the vehicle identification number (VIN). This Court specifically limited its holding to whether there was a reasonable expectation of privacy in the VIN number. *Id.* at 107. Slightly rearranging papers obstructing the VIN is considerably different than

entering a vehicle to search under the seat, around the seat, in the side door pouches, above and under the visors, in and around the console, in and around the seats, between the seats, in and around the glove compartment, and in any other place that registration papers might be found. *Branham* is not in conflict.

B. The Lone Federal Case.

Petitioner claims the decision in *Branham* conflicts with the Tenth Circuit's holding in *United States v. Miller*, 84 F.3d 1244 (10th Cir. 1996). This is incorrect. In *Miller*, the driver was stopped for speeding Kansas. While the driver produced a valid Kansas drivers license, the vehicle he was driving had Missouri license plates, even though the driver said he purchased the vehicle in California. *Id.* at 1248. The driver further admitted that the vehicle had fictitious plates. On this basis, the officer copied the VIN from the door jam and the dash. *Id.* While talking to the passenger, the officer saw drug paraphernalia in plain view. The driver admitted it was his. The driver was arrested and an inventory search of the vehicle turned up drugs, drug paraphernalia, and weapons. *Id.* at 1249.

The passenger challenged the search on appeal. The sole question was whether the officer acted reasonably in obtaining the VIN. *Id.* at 1251. Relying on this Court's

decision in *New York v. Class*, 475 U.S. 106 (1986), the court ruled the actions of the officer reasonable.

The decision in *Miller* has no bearing on the decision in the instant case. It must be remembered that the question raised in the instant petition is the reasonableness of a search of all portions of a vehicle where registration may be found in situations where the citizen driving the vehicle is not suspected of criminal activity and has produced a valid drivers license. *Miller*, however, deals with an arrest of a driver due to criminal activity coupled with a limited search of the VIN of the vehicle.

C. The California Case.

The petitioner claims that *Jackson v. Superior Court*, 142 Cal. Rptr. 299 (Cal. 1977), is in conflict with the Arizona decision. If anything, *Jackson* supports the decision.

Jackson involved the stop of a vehicle for erratic driving. The driver appeared to be intoxicated and was arrested. The officer never asked the driver for registration. The vehicle was left along the side of the road. *Id.* at 300-01.

The officer began an inventory of the vehicle contents beginning by looking for the registration which was ultimately discovered under the visor. Before finding the registration, however, the officer found contraband in the glove compartment and under the seat. The driver moved to

suppress.

On appeal, the state argued that the officer had the right to enter the vehicle to look for the registration. The California appellate court disagreed:

> [The officer] may have assumed that the search for the registration was just standard procedure in the stopping of a vehicle -- a procedure which should be reassessed in the light of the alternative procedures, such as license checks per radio and other advanced technological developments that may be available.

Id. at 303.

The Court further held that even though California had a specific statute which authorized the search of vehicles for registration, *Id.* at 302 n.3, all officers had to first inquire as to the location of the registration before there would even be any possible grounds to look for it. *Id.* at 303.

The California Case generally supports the decision of the Arizona Court and it must be remembered that California, unlike Arizona, has a statute permitting a search for registration. Thus, the California decision is based primarily on state law and not on federal constitutional law.

D. The New York Case.

People v. Reyes, 499 N.Y.S.2d 321 (N.Y. Sup. Ct. 1986), like the federal case mentioned in subsection B, above,

is a VIN search case and does not have anything to do with the issue presented here.

In *Reyes,* the driver had been under police surveillance and confronted the officers who had been following him. The officers asked for license and registration but the driver could not produce them. A later check of the VIN on the underside of the vehicle revealed it was stolen. *Reyes* has no applicability to the *Branham* decision and the issue being presented here.

E. The Rhode Island Case.

In *State v. Halstead,* 414 A.2d 1138 (R.I. 1980), the police observed a rental truck at 4:30 a.m. in a high crime area traveling 15-20 mph below the speed limit. The occupants of the rental vehicle "gawked" at the police for an unusually long time. *Id.* at 1148. The officers pulled the truck over for a license and registration check. The driver could not produce a valid registration and scuffled with the police. He was arrested. The vehicle was seized for impoundment. The police began to inventory the contents of the vehicle. *Id.* at 1149.

On the basis of *South Dakota v. Opperman,* 428 U.S. 364 (1976), the Rhode Island Supreme Court found the actions of the police to be in compliance with the Fourth Amendment. *Halstead,* 414 A.2d at 1148. The *Halstead* Court made a passing reference, in a footnote, to the decision of the New

Jersey Supreme Court in *State v. Boykins*, 232 A.2d 141 (1967), but did not base its decision on that case.

Moreover, it is interesting to note that prior to the search, the trial court in *Halstead* ruled that the conduct of the occupants of the vehicle created a reasonable suspicion that the vehicle or its occupants were involved in criminal activity. *See*, 414 A.2d at 1149 n. 14. On this basis, ruled the trial court, the officers were justified in the search of the truck. This is the same type of reasoning adopted by the Arizona Court in the *Branham* decision.

Halstead does not apply to the issue presented since the Rhode Island Court's decision as to the validity of the search was based on legal principles promulgated by this Court in the *Opperman* decision.

F. New Jersey - *State v. Boykins*.

As with the California case in Subsection C, above, this case also supports the decision of the Arizona Appellate Court. Contrary to the petitioner's claim, this case does not stand for the proposition that "failure to produce proof of registration justified officer's search for evidence of ownership." (Petition at 7). In fact, *Boykins* clearly stands for the proposition stated by the Arizona Court of Appeals: When facts are presented which provide a basis for believing a vehicle is stolen or

involved in some other criminal activity, a search of the car for relevant information is permissible.

State v. Boykins, 232 A.2d 141 (N.J. 1967), involved officers observing a vehicle speeding and driving in a reckless manner. The officers came along side the car and told it to pull over. The driver said he would. Instead of pulling over, however, the driver "'took off with his wheels screeching,' swerving toward the police car in an effort to hit it." *Id.* at 142. The car led the police on a chase, nearly hitting pedestrians. When it stopped, various occupants fled the car. A search of the car revealed weapons and drugs. *Id.*

The trial court suppressed the evidence holding that there was no permissible basis for the search since the suspects were in custody at the time of the search. *Id.* In finding otherwise, the Supreme Court of New Jersey held:

> [T]he search was valid on another basis. *The facts recited above plainly suggest the driver and his passengers or one or more of them were involved in some substantial criminal affair.*
>
> * * *
>
> Such behavior strongly suggests a probability that the occupants had on their persons or in the car contraband or instruments or the fruit of crime. It seems to us that in such circumstances the public interest requires that the men and the vehicle be searched. . . .

Id. at 143 (emphasis added).

As this language reveals, *Boykins* does not support petitioner's claim. The part of *Boykins* relied upon by petitioner is *dicta* and unrelated to the holding or analysis of *Boykins.*

G. New Jersey - *State v. Patino*.

Again, as with many of the cases relied upon by petitioner, this case also supports the decision of the Arizona Court of Appeals. *State v. Patino,* 414 A.2d 1327 (N. J. 1980), deals with a stop of a vehicle under the now unconstitutional practice of a license and registration check. As the officer approached the vehicle, he saw the passenger give the driver the registration and insurance documentation. While speaking to the occupants, the officer saw marijuana in a container in plain view. *Id.* at 1329. The occupants were arrested on the basis of the drugs and a search of the vehicle was conducted incident to a lawful arrest. In the trunk of the vehicle was found cocaine. *Id.*

On appeal, the New Jersey Supreme Court held that the search of the front of the vehicle was lawful as incident to the arrest. *Id.* at 1330. The court, however, found the search of the trunk to be unreasonable because the suspects had no access to the trunk. *Id.* at 1331.

It is only in *dicta* that the court makes passing reference to an earlier case where a lower court in *State v. Barrett,* 406 A.2d 198 (N.J. Super. 1979), ruled it was permissible to search a glove compartment for vehicle registration. *Patino,* 414 A.2d at 1332. A review of the *Barrett* case, however, shows that preceding the search for the vehicle registration in that case, the accused had been spotted in the rear of a restaurant engaged in suspicious activity (e.g., rummaging through another vehicle, turning off lights while driving). 406 A.2d at 212.

It was on these facts that the *Barrett* court found it permissible to search for registration. This is no different than the situation confronted by the Arizona Court of Appeals. As in the *Branham* decision, the search in *Barrett* was justified due to factors which gave rise to a belief that the vehicle was involved in criminal activity. The *Patino* decision does not support the position of the petitioner.

H. <u>The North Carolina Case</u>.

This is the only case which supports the petitioner's position, i.e., that it is lawful and reasonable to search a citizen's vehicle for registration when the citizen fails to present proof of ownership and there is no indication whatsoever that the vehicle or citizen has been involved in criminal activity.

In *State v. Byrd*, 209 S.E.2d 516 (App. N.C. 1974), the Court of Appeals of North Carolina was presented with a search which followed the now unconstitutional practice of stopping vehicles for license and registration checks. When the driver failed to produce registration for the vehicle, the police searched the car and found a gun in the glove compartment. The appellate court ruled this search was constitutional. *Id.* at 517. It should be noted however, that the case was never appealed to the highest court of North Carolina and therefore does not represent a final resolution of the issue for that state. Thus, there is no conflict between jurisdictions as a result of the *Byrd* decision.

III. It is Unreasonable to Permit a Search of a Considerable Portion of the Interior of a Vehicle in the Absence of a Reasonable Belief that the Car is Stolen or Otherwise Involved in Criminal Activity.

A citizen does not surrender the protections of the Fourth Amendment by entering an automobile. *Delaware v. Prouse,* 440 U.S. 648, 663 (1979). The interior of a car is subject to Fourth Amendment protections from unreasonable searches by the police. *New York v. Class,* 475 U.S. 106, 114-15 (1986).

This Court has noted that in determining the reasonableness of a search, the only test which may be applied is the balancing of "'the need to search against the invasion which the search entails.'" *Id.* at 116, *quoting, Camara v. Municipal Court,* 387 U.S. 523, 534-35 (1967).

In this petition, the petitioner seeks to have this Court adopt as law the rule that, in the absence of any indication that the vehicle is stolen or the driver involved in criminal activity, a person stopped for speeding who produces a valid drivers license but no registration may have their car's interior searched for registration in all places where the registration might be found.

As the Arizona Court of Appeals noted in the *Branham*

decision, and as the California Supreme Court noted in *People v. Superior Court,* 496 P.2d 1205, 1210 (1972), the inability to produce registration -- in the absence of any other factors -- is consistent with innocent behavior.

On the basis of this innocent behavior -- and nothing else -- the petitioner urges this Court to sanction searches of the following portions of the interior of a vehicle: under the seats, around the seats, the side door pouches, above and under the visors, the dash, in and around the console, in and around the seats, between the seats, in and around the glove compartment, and any other place that the registration might reasonably be found. As Professor La Fave notes in his treatise on search and seizure, *"This is significant in that a search for this purpose may at least sometimes be more intrusive than would likely be permitted in an ordinary inventory of the contents [of the vehicle.]*" La Fave, Search and Seizure § 7.4(d) at 567 (3d ed. 1996). (Emphasis added).

Thus, in applying the second portion of the balancing test, above, the search sought to be allowed by the petitioner is exceptionally intrusive, and sometimes more intrusive than an inventory search.

As to the first portion of the test, the need to search, the need is minimal. To begin, an officer may check the VIN to

determine ownership. Second, the officer may determine ownership through the license plate on the vehicle. In each instance, the officer has electronic means available to determine ownership. The need to search is nonexistent.

Applying the balancing test promulgated by this Court results in the following if the petitioner's position is accepted: an exceptionally intrusive search where the need to search is nonexistent. Respondent submits that the petitioner's position violates the Fourth Amendment.

As to the requirement set forth in the *Branham* decision that there be some sort of indication of criminal activity before a search is permissible, this Court has noted (when discussing the reasonableness of a vehicle search):

> "'in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, justifiably warrant that intrusion.'"

New York v. Class, 475 U.S. 106, 116-17 (1986), *quoting, Terry v. Ohio*, 392 U.S. 1, 21 (1968).

The *Branham* decision is consistent with the Fourth Amendment principles promulgated by this Court. The petition for certiorari should be denied.

Conclusion

The decision of the Arizona Court of Appeals in *Branham* is entirely consistent with Fourth Amendment principles promulgated by this Court in previous decisions. If this Court were to adopt the reasoning of the petitioner, innocent behavior by drivers (the lack of registration) would permit an excessively intrusive vehicle search even though officers have other means (VIN and license plates) to determine ownership of a vehicle.

Respectfully Submitted,

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APPENDIX

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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May 28, 1998 HONORABLE JAMES H. KEPPEL B. Wessing
Deputy

No. CR 96-90862

Filed Jun 01 1998

STATE OF ARIZONA
County Attorney
James A. Rizer
By: David J. Flader

v.

WILLIAM LEE BRANHAM
Christine L. Israel, P.D.

10:50 a.m. This is the time set for hearing to consider oral argument re: Court of Appeals remand. State is represented by above-named counsel. Defendant is not present, but is represented by above-named counsel.

Court Reporter, Laurie Yazwa, is present.

The Court indicates it has read the transcript of Officer Johnson's testimony at an evidentiary hearing before Judge Hendrix on September 13, 1996. With regard to whether or not the Defendant had given his consent to search the vehicle in question, Officer Johnson stated, "I didn't ask him for consent." Said quote is taken from page 14 of the transcript.

Accordingly, the Court finds that the State has not provided clear and positive evidence that the consent to search was freely and voluntarily given by the Defendant in this case and the evidence seized is suppressed.

IT IS FURTHER ORDERED granting the Motion to Dismiss with Prejudice.

Pursuant to the granting of the Motion to Dismiss,

IT IS ORDERED vacating the judgement of conviction previously entered in this case and,

IT IS FURTHER ORDERED that any sums paid toward the fine imposed by the Court on March 11, 1997 shall be reimbursed to Mr. Branham.

10:55 a.m. Matter concludes.